UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON OCTOBER 29, 2010

MOTIONS FOR SUMMARY RELIEF AND
PARTIAL SUMMARY RELIEF DENIED: September 27, 2010

CBCA 1676

ERICKSON AIR-CRANE, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman of Saltman & Stevens, P.C., Washington, DC, counsel for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **DRUMMOND**, and **SHERIDAN**.

GILMORE, Board Judge.

Appellant, Erickson Air-Crane, Inc. (Erickson), appealed the final decision of a Department of Agriculture contracting officer (CO) denying Erickson's equitable adjustment claim of $3,032,173.51 to compensate it for idle equipment and idle personnel costs during the period it was ordered to stop work because of a bid protest. The Department of Agriculture, Forest Service (FS) has filed a motion for partial summary relief. The FS's position is that because Erickson was not prevented by the Government from securing work

during the suspension period for the three helicopters for which work was suspended under the contract, Erickson is not entitled to the idle equipment costs it has claimed in its request for an equitable adjustment. Erickson objected to respondent's motion and filed a cross-motion for summary relief, arguing that the methodology it employed to calculate the equitable adjustment is an acceptable accounting method, and properly accounts for the costs that were allocable to the FS contract and were not covered by work it was able to secure under other contracts during the period of suspension. Erickson argues that the costs of idle equipment allocable to the FS contract due to the suspension are costs that can be recovered as a part of an equitable adjustment. For the reasons below, we deny respondent's motion for partial summary relief and appellant's motion for summary relief.

Factual Background

The following facts appear to be undisputed based upon the present record.

1. On March 3, 2008, the FS solicited offers for the FS's exclusive use of heavy and medium helicopters for firefighting services at thirty-four locations, each of which would be the home base for one helicopter. Each helicopter location had its own contract line item number (CLIN). These CLINs included CLIN 3, located at Silver City, New Mexico, and Helena, Montana; CLIN 7, located at Reno/Stead, Nevada; and CLIN 8, located at Rifle, Colorado.

2. The solicitation specified a Mandatory Availability Period (MAP) during which time the helicopter provided could work only for the Forest Service. The length of each MAP varied by line item, but generally ran from June to October of each year. During this time the contractor would be paid a "daily availability rate" per day per helicopter, and an "hourly flight rate" for each hour actually flown. The contract provided that "[t]he flight rate will be an indefinite quantity with no guarantee of flight hours given by the Government." Appeal File, Exhibit 1 at 2. The solicitation required that the helicopters be "operated by qualified and proficient personnel to be used primarily for water delivery to fight forest fires." *Id*. at 80. The contract was to cover a base year and two option years.

3. On June 6, 2008, the FS awarded Erickson a contract to provide helicopters for four locations (one of which is not involved in this dispute). The locations involved here are Silver City (CLIN 3), Reno/Stead (CLIN 7), and Rifle (CLIN 8). For CLINs 3, 7, and 8, the contract's daily availability rate for the three helicopters involved was $18,900.

4. The notice to proceed for services under CLIN 3 was issued on June 14, 2008, and the MAP was to end on October 10, 2008. The notice to proceed under CLINs 7 and 8

was issued on June 20, 2008, and the MAP period was to end on October 28, 2008. Appeal File, Exhibits 3-5.

5. On June 24, 2008, the FS received notice of a bid protest of the award of CLINs 3, 7, and 8 to Erickson. In accordance with the protest after award protocol, the FS issued a stop-work order to Erickson on that same day.

6. The contract incorporated FAR 52.233-3, Protest After Award, which provides in pertinent part that:

> (a) . . . . Upon receipt of the [stop-work] order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either–
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> (1) Cancel the stop-work order; or
>
> (2) Terminate the work covered by the order . . . .
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> (b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if–
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> (1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contracts . . . .

7. Because of the contractor's duty to mitigate costs, Erickson sought alternative work during the suspension period. During the suspension, Erickson flew for the FS under a Call When Needed (CWN) basis operating agreement and also flew for other customers outside of the Federal Government. According to Erickson, during the MAP, the helicopter assigned to CLIN 3 flew a total of 67 days and was idle for 34; the helicopter assigned to CLIN 7 flew for 61 days and was idle for 40; and the helicopter assigned to CLIN 8 flew for 48 days and was idle for 53. Appeal File, Exhibit 10 at 2. For CLIN 3, 57 days of work were CWN for the FS, and 10 days were other work; for CLIN 7, 38 days of work were CWN and 23 days were work for other customers; for CLIN 8, 47 days of work were CWN and one day was work for another customer. *Id*.

8. On October 2, 2008, after the Government Accountability Office (GAO) had issued a decision on the bid protest, an Erickson employee spoke with the CO on the phone, and then wrote in an e-mail that the CO had no problem with Erickson's moving helicopters out of the country and that the parties to the contract would "work it out." Government's Statement of Uncontested Facts in Support of Motion for Partial Summary Relief, Exhibit 1. On October 3, 2008, after 101 days of suspension, the Government issued an order to resume performance on the suspended contract. Performance resumed on October 4, 2008. Appellant immediately advised respondent of the status of the helicopters that were to be reserved for the Government's exclusive use under the FS contract. It appears that, at this time, the helicopters were not immediately available to resume work. Government's Statement of Undisputed Facts, Exhibit 2.

9. On October 30, 2008, Erickson submitted a request for an equitable adjustment for idle equipment and crews in the amount of $3,032,173.51. This amount was calculated by taking the annual cost of ownership and direct labor per helicopter and dividing that by 244 days (anticipated revenue days for 2008), which provided the daily ownership cost for each helicopter. This daily rate was then multiplied by the number of days Erickson contends each helicopter was idle during the suspension. The number 244 for revenue-producing days for each of the three helicopters in 2008 was based on Erickson's 2007 average-use figures. The total idle costs included idle helicopter ownership costs, idle equipment costs, and costs for idle crews. Exhibits to Appellant's Cross-Motion for Summary Relief, Accounting Consultant's Report at 12.

10. On February 12, 2009, the CO sent a letter to Erickson disputing the manner in which Erickson calculated its equitable adjustment, stating the following:

> As you are aware, the contract schedule of items is broken down into availability and flight. The rate for availability covers all costs and profit not associated with the direct costs of flight. The flight rate is intended to compensate the vendor for direct costs for the helicopter when it flies. Flight hours are estimated and may or may not be realized. The potential loss of availability is the only portion that we would consider for an equitable adjustment resulting from the stop work order.

Appeal File, Exhibit 10 at 1.

11. The CO further stated in that letter that based upon documentation the CO was enclosing, the total availability awarded for the MAP was $7,919,100, and that Erickson had

already received $7,710,156 from FS contracts under the CWN agreement and also from flights in the periods before the stop-work order and after the work resumed, not including work on other projects, leaving a difference of $208,944. Appeal File, Exhibit 10 at 2. The FS believed this difference might even be made up eventually under the CWN agreement that ran through April 30, 2009. *Id*.

12. After the parties were unable to resolve the dispute, Erickson filed a claim on October 30, 2009, asking for idle equipment and idle crew costs that were allocated to the FS contract at issue for the period the helicopters and crews were idle, in the total amount of $3,032,173.51. Appeal File, Exhibit 9. By letter dated July 10, 2009, the CO issued a final decision, denying the claim, stating that Erickson had not demonstrated that the stop-work order had resulted in any increase in costs allocable to the FS's exclusive-use contract, since Erickson was able to secure other contracts using the same helicopters during the suspension period. *Id.*, Exhibit 12. On July 31, 2009, Erickson filed a notice of appeal to this Board. *Id.*, Exhibit 13.

Cross-Motions

Respondent filed a motion for partial summary relief, contending that the facts are not in dispute and, by law, Erickson is not entitled to any idle equipment costs during the suspension period because the Government did not prevent appellant from procuring alternate work during the suspension, and did not require appellant to keep its equipment ready to resume work. Respondent cited *J.D. Shotwell Co*., ASBCA 8961, 65-2 BCA ¶ 5243, and *Melka Marine, Inc. v. United States*, 41 Fed. Cl. 122 (1998), in support of its position. Memorandum In Support of Government's Motion For Partial Summary Relief at 5. Appellant opposed respondent's motion, arguing that the law does not state that idle equipment costs cannot be claimed if the contractor is able to secure other work during the suspension period. Appellant further argues that it was required by the contract to keep its helicopters and crews on ready status in order to resume work in the event the protest was denied, and that it was only required to mitigate costs stemming from the contract suspension. Appellant, in its cross-motion for summary relief, contends that the material facts are not in dispute; it is entitled to costs in the amount of $2,841,578; and it has shown through acceptable accounting methods that these costs are properly allocable to the contract due to the suspension for a period of 101 days.

Discussion

This Board can only grant summary relief when there is no genuine issue of material fact and the moving party is entitled to relief as a matter of law. *Anderson v. Liberty Lobby,*

Inc., 477 U.S. 242, 247 (1986). When both parties have moved for summary relief, the Board will consider each motion on the merits, and construe any reasonable inferences against the party whose motion is under consideration. *First Commerce Corp. v. U.S.,* 335 F.3d 1373, 1379 (Fed. Cir. 2003). The fact that both parties have moved for summary relief does not mean that the Board must grant relief in favor of either party; if there are any issues of material fact, then summary relief is not proper for either one of the parties. *Mingus Constructors, Inc. v. U.S.*, 812 F.2d 1387 (Fed. Cir. 1987).

Although there appears to be no dispute between the parties regarding the material facts that led up to the dispute, i.e., that the contract was suspended for 101 days during a period when Erickson was to keep its helicopters available for the exclusive use of the Government; that suspensions due to bid protests to the GAO normally last no more than 100 days; and that during the suspension period Erickson was able to secure work for the helicopters in question, there are other facts upon which the parties disagree which bear upon the propriety of Erickson's calculation of the costs it claims are allocable to the FS contract due to the suspension of work. As to respondent's motion for partial summary relief, we are not convinced at this stage that Erickson cannot legally recover idle equipment costs, and thus, deny respondent's motion. The cases cited by respondent do not involve a suspension due to a bid protest where a resolution of the protest is expected to be resolved within 100 days. Nor did respondent cite any cases addressing a relatively short suspension under a contract where the contractor is required to have its equipment available for the exclusive use of the Government. That being said, considering the facts of this case, we believe there may be more compelling bases for Erickson to recover any damages it might have suffered than assessing its idle equipment costs in calculating its damages.

As to appellant's motion for summary relief, the facts show that Erickson took reasonable steps to minimize the costs that might be allocable to performance of the contract due to the suspension. However, it is not clear from the present record whether, and to what extent, the alternate work that was obtained during the suspension minimized any damages appellant incurred during the suspension. We note that the work here was suspended during the MAP, and that the FS contract did not guarantee any actual flight hours during this period. The record is not clear as to why appellant uses 244 revenue producing days, or whether the 101 days of suspension during the MAP should be viewed as coming entirely within the revenue producing period. Additionally, appellant has not clearly explained how it accounted for the revenue it received when working under the CWN ordering agreement in calculating its losses.

In summation, we find that the record has not been sufficiently developed at this stage, and does not provide undisputed facts that the costs appellant seeks were a direct result of the suspension. Appellant has not established a sufficient nexus between the losses claimed and the suspension. We, thus, also deny appellant's motion for summary relief.

Decision

Appellant's **MOTION FOR SUMMARY RELIEF** is **DENIED**, and respondent's **MOTION FOR PARTIAL SUMMARY RELIEF** is **DENIED**.

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BERYL S. GILMORE
Board Judge

We concur:

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JEROME M. DRUMMOND
Board Judge

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PATRICIA J. SHERIDAN
Board Judge